Tradesmen International, Inc. *and* Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL–CIO. Case 8–CA–29079

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 11, 1999, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint, finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to hire Matthew Oakes on and after May 30, 1997. We disagree.

Facts

The facts, as more fully set forth by the judge, may be summarized as follows. The Respondent supplies skilled tradesmen primarily to nonunion construction companies in the eastern United States. On January 15, 1997, Bay Mechanical and Electrical, Inc. (Bay), a nonunion construction company in Lorain, Ohio, contracted with the Respondent for various tradesmen to perform work on Bay's contract to build a hospital in Lorain.

A Lorain ordinance requires subcontractors engaged in the construction of a building within the city limits to post a $5000 surety bond to ensure compliance with all building codes. The bond funds the operations of the city building inspection department. The Respondent did not post a bond in connection with its employees' work for Bay on the Lorain hospital.

In early 1997, Matthew Oakes, a union organizer in northern Ohio, learned that the Respondent's employees were working for Bay on the hospital project and began soliciting those employees to sign union authorization cards. Then, on March 24, Oakes himself contacted the Respondent about obtaining employment in the heating, ventilating, and air-conditioning (HVAC) field. Oakes completed an employment application in which he disclosed his full-time position as an organizer of nonunion companies. Christopher Haders, one of the Respondent's recruiters, interviewed Oakes and informed him that he was qualified to perform HVAC work for the Respondent. Oakes called Haders several times in April and May and asked when he could start work, but there was no HVAC work available at that time.

Also in May, Oakes provided Jack Murphy, the city of Lorain's chief building inspector, with a list of three subcontractors, including the Respondent, whom Oakes believed were not in compliance with the city's bonding ordinance. Murphy decided to order all the Respondent's employees off the Lorain hospital site, but his order was stayed pending a ruling by the Lorain Board of Building Standards and Appeals (the Lorain Board) as to whether the Respondent was a subcontractor within the meaning of the city ordinance.

On May 28, the Lorain Board held a hearing on Murphy's proposed order. Oakes, accompanied by union counsel, attended the hearing for the Union. The Respondent was represented at the hearing by its vice president, Keith Allen, and by counsel. Following the Respondent's presentation of its position to the Lorain Board, the chairman of the Lorain Board turned to Oakes and said, "Representative for Sheet Metal Workers." Oakes gave his name and said he was "with Sheet Metal [W]orkers, Local Union 33, Northern Ohio." He explained that the Union "cover[ed] Northern Ohio, including this area," and that, "[w]e are here, as discussed earlier, about the sub contractors [sic] issue regarding Tradesmen International Inc." Oakes then presented the reasons why the Union believed that the Respondent was a subcontractor on the Lorain hospital project and, therefore, was required to post a bond in accordance with the city ordinance.

At the unfair labor practice hearing before the administrative law judge, Oakes testified as follows about the connection between his appearance before the Lorain Board and his duties as a union representative:

> [W]hen you go into do a project, whether you're union or non-union, there's a cost factor. And part of my job, as a representative of the Union and as an organizer, is to level that playing field as much as possible.

As to the Union's objective, Oakes testified, "We wanted a definition as to whether or not [the Respondent] needed to

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

comply with the same criteria and the same conditions that our union contractors had to comply with."[2]

On May 30, Oakes again called the Respondent about performing HVAC work and, again, was informed that no work was available. However, Vice President Allen then called Oakes and, as the judge found, told Oakes:

> You intentionally tried to hurt our company. So we don't want you working for us. We're not going to put you to work.

The Respondent thereafter assigned existing employees and hired new employees to perform HVAC jobs, which Oakes was qualified to perform, and has since refused to employ Oakes to perform such work.

Analysis

The judge found that the Respondent's refusal to hire Oakes for HVAC work on and after May 30 was motivated solely by his May 28 testimony before the Lorain Board. This finding is undisputed.[3] Indeed, the Respondent has not claimed that it would have refused to hire Oakes for some other reason, even in the absence of his testimony.

Thus, if Oakes' May 28 testimony was protected by Section 7, and constituted concerted and union activity, then it follows that the Respondent's discharge of Oakes for this conduct was solely unlawfully motivated and violated Section 8(a)(3) and (1) of the Act. See No*r-Cal Beverage Co.,* 330 NLRB 610 (2000), and cases cited therein ("dual motive" analysis of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cr. 1981), cert. denied 455 U.S. 989 (1982), not applied where respondent's action is motivated solely by discriminatee's protected or union activity). As we explain below, we find that Oakes' May 28 testimony constituted protected concerted activity.

As the Supreme Court has stated, Section 7 of the Act "defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities." *NLRB v. City Disposal Systems,* 465 U.S. 822, 831 (1984). Accordingly, when an individual assists a union, or engages in union-related activity, by definition he is engaged in concerted activity. See *Spartan Equipment Co.,* 297 NLRB 19 (1989) (individual employee's filing of a criminal charge against his employer was concerted where it was an outgrowth of his attempt to act as a union spokesperson); *Carpenters Local 925,* 279 NLRB 1051, 1059 fn. 40 (1986) (individual employee's effort to obtain union representation was concerted).

In the instant case, Oakes appeared before the Lorain Board in furtherance of the Union's legitimate interest in "leveling the playing field" between union and nonunion contractors by ensuring that the Respondent, a nonunion contractor, did not have an unfair competitive advantage by virtue of its noncompliance with the surety bond ordinance. By giving such testimony, Oakes was assisting the Union and its constituents and, thus, was engaged in concerted activity under the express terms of Section 7 of the Act. See *City Disposal Systems,* supra at 831; see also *GHR Energy Corp.,* 294 NLRB 1011, 1014 (1989) (employee/union official's testimony before state agency and Senate committee about employer's violations of environmental law was union and concerted activity), enfd. mem. 924 F.2d 1055 (5th Cir. 1991); *Pete O'Dell & Sons Steel,* 277 NLRB 1358, 1359 (1985) (employee who assisted union by testifying in government inquiry into employer's violation of Davis-Bacon Act was engaged in concerted or union activity), enfd. mem. 803 F.2d 1181 (4th Cir. 1986).

We emphasize that Oakes appeared in his capacity as a representative of the Union. The undisputed evidence is that Oakes identified himself as being "with Sheet Metal [W]orkers, Local Union 33, Northern Ohio" and that he explained, "[*W*]*e* are here, as discussed earlier, about the sub contractors [sic] issue regarding Tradesmen International Inc." (Emphasis added.) Moreover, we note that the cochairman of the Lorain Board called on Oakes to testify as the "Representative for Sheet Metal Workers," and that Oakes was accompanied by union counsel, which further indicates that he was authorized to speak for, and was speaking for, the Union and its constituents.[4]

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[2] The Lorain Board subsequently determined that the Respondent was not subject to the city ordinance.

[3] It is also undisputed that Oakes was qualified for the position for which he applied, that the Respondent in fact offered Oakes employment, and that the Respondent subsequently reversed that decision and refused to employ Oakes after his appearance before the Lorain Board.

[4] The judge erroneously read *NLRB v. City Disposal Systems,* 465 U.S. 822 (1984), as holding that a single employee's activity is concerted only if he intends to induce group action or acts as a representative of at least one other employee. In fact, the Court held that the Board reasonably interpreted the term "concerted activit[y]" to include a single employee's invocation of a collectively-bargained right—even if done in his own self-interest. See *City Disposal,* supra at 830–831. We are satisfied that Oakes' activity was on behalf of the Union and, thus, it matters not that he acted alone. See *Carpenters Local 925,* 279 NLRB at 1059 fn. 40.

Moreover, *Pikes Peak Pain Program,* 326 NLRB 136 (1998), relied on by the Respondent, is distinguishable. In *Pikes Peak,* the Board concluded that an individual employee's filing of a wage claim against her employer with a state agency was not concerted activity. Unlike the present case, there was no evidence that the employee in *Pikes Peak* was assisting a union or even seeking to represent other employees.

We also find that the Respondent had knowledge of the concerted nature of Oakes' activity. As the judge found, the Respondent knew that Oakes was affiliated with the Union as an organizer. Moreover, as described above, Oakes identified himself at the hearing as being with the Union, he was called on to testify as a representative of the Union, and he was accompanied at the hearing by union counsel. Furthermore, in replying to Oakes' testimony, the Respondent's counsel at the hearing asserted, "I don't believe the sheet metal workers union has any interest in this whatsoever." These facts show that the Respondent knew that Oakes was appearing on behalf of the Union.

The judge went on to conclude that, even if Oakes' activity was concerted, it was not protected. Again, we disagree. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court made clear that the "mutual aid or protection" clause in Section 7 of the Act encompasses employee attempts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." 437 U.S. at 565. As the judge noted, the "mutual aid or protection" clause is not limitless. To be protected, activity must bear some relation to legitimate employee concerns about employment related matters. See *Kysor Industries Corp.,* 309 NLRB 237, 237 fn. 3 (1992).

Contrary to the judge and our dissenting colleagues, we find that there was a nexus between Oakes' activity and employees' legitimate concern over their continued employment. Oakes' attempt to secure the Respondent's compliance with the Lorain bonding ordinance was designed to protect local unionized companies and, in turn, the job opportunities of their employees, by ensuring that the Respondent did not have an undue bidding advantage in the Lorain construction market. This activity was similar to area-standards picketing, by which unions attempt to protect their constituents' jobs by generating public and economic pressure on nonunion employers to pay higher wages and benefits, thereby ending unfair competitive advantage. See generally *Giant Food Markets,* 241 NLRB 727, 728 (1979) (discussing area-standards picketing), enf. denied on other grounds 633 F.2d 18 (6th Cir. 1980).

In this respect, the judge erroneously relied on his factual finding that Oakes' testimony did not directly concern "the specific terms and conditions of employment of [Respondent's] employees." As the Supreme Court explained in *Eastex,* the "mutual aid or protection" clause in Section 7 of the Act "was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." 437 U.S. at 564. The Board, with court approval, has consistently honored that congressional intent. See, e.g., *O'Neil's Markets v. NLRB*, 95 F.3d 733, 737 (8th Cir. 1996) (area-standards handbilling by nonemployees protected); *NLRB v. Browning-Ferris Industries,* 700 F.2d 385, 387–388 (7th Cir. 1983) (employees' refusal to cross picket line at customer's property protected); *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385 (9th Cir. 1976) (engineers' lobbying of Congress to deny another company's request for visas for foreign engineers protected); *Fort Wayne Corrugated Paper Co. v. NLRB,* 111 F.2d 869, 874 (7th Cir. 1940) (employee's assistance to a customer's employees protected); *Yellow Cab, Inc.,* 210 NLRB 568, 569 (1974) (employee's distribution of handbills supporting other employers' employees protected).

Furthermore, we disagree with the judge's conclusion that Oakes' activity was designed to harm the Respondent in a manner that would warrant the conclusion that his activity fell outside the protection of the Act. To be sure, if the Lorain Board had found that the Respondent was subject to the bonding ordinance, then the Respondent's cost of doing business in Lorain would have increased. But it is well settled that "activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer." *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 fn. 7 (1st Cir. 1976) (employee's act of reporting his employer's unauthorized binding of a union-labeled job to preserve work for employees of unionized binderies was protected, even though employer lost the job and future business). Indeed, Section 7 protects many forms of concerted activity, such as strikes, picketing, and handbilling, which may be injurious to an employer's business.[5]

Nor can it be said that the fact that the Lorain Board determined that the Respondent was not required to post a bond is evidence that Oakes raised the issue in bad faith. See *Fredericksburg Glass & Mirror,* 323 NLRB 165, 179 (1997) (employees' activity of assisting government inquiry into employer's alleged noncompliance with the Davis-Bacon Act was protected "whether or not [the employees] were correct, or even reasonable, in their honest belief" that they were entitled to greater pay).

Finally, we reject the Respondent's argument that this case is analogous to *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953). In *Electrical Workers,* the Supreme Court agreed with the Board that the Act did

[5] Our dissenting colleague argues that Oakes' activity was unprotected because, if successful, the Respondent might have been forced off the hospital project and its employees might have been harmed. In fact, the Respondent could have remained on the hospital job simply by posting the requisite bond.

not protect employees' activity of distributing in an ongoing labor dispute 5000 handbills disparaging the quality of their employer's product and its business policies. 346 U.S. at 471, 477. In finding this activity unprotected, the Court emphasized the lack of any connection between the handbilling and the union's interests in the dispute. Indeed, the handbills did not even mention the union or the dispute. 346 U.S. at 468.

Here, in contrast, in testifying before the Lorain Board, Oakes said nothing about the quality of the Respondent's work. The minutes of the hearing show that Oakes confined his remarks to the reasons the Union believed the Respondent was a subcontractor under the city ordinance. We do not think that activity can be fairly characterized as causing an employer "harm" in the sense contemplated by *Electrical Workers.* Cf. *Petrochem Insulation, Inc.*, 330 NLRB 47, 50 (1999) (union's lobbying against employer's interests in state regulatory proceedings was protected and could not be considered "coercive" under the Act); *Roadmaster Corp.*, 288 NLRB 1195 (1988) (union official's complaint to federal government about his employer's illegal labeling of imported bicycles was protected where tied to "his concern as a union representative that the [employer's] action could cause a loss of jobs in the area"), enfd. 874 F.2d 448 (7th Cir. 1989).

For the foregoing reasons, we conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Oakes on and after May 30, 1997.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire Matthew Oakes, we shall order the Respondent to offer him immediate employment that he would have had, but for the unlawful discrimination against him, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful failure to hire Oakes, and to notify him that this has been done.

ORDER

The National Labor Relations Board orders that Respondent, Tradesmen International, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire or otherwise discriminating against any individuals because they formed, joined, or assisted the Union and its constituent members or engaged in protected concerted activities, or to discourage employees from engaging in these activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, immediately hire Matthew Oakes to the position he would have had, but for its unlawful discrimination against him, or, if the position no longer exists, to a substantially equivalent position.

(b) Make Matthew Oakes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy portion of this decision.

(c) Within 14 days from the date of this Order, removed from its files any and all references to its unlawful failure and refusal to hire Oakes, and within 3 days thereafter, notify him in writing that this has been done, and that the unlawful conduct will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, and at its jobsite in Lorain, Ohio, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

[6] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since May 30, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply with this Order.

MEMBER HURTGEN, dissenting.

Unlike my colleagues, I would dismiss the complaint. I assume arguendo that Oakes' activity before the Lorain Board was union activity and was thus concerted. However, that activity was not protected. In *Eastex,* the Supreme Court stated that the relationship between concerted activity and employee interests in employment conditions could be "so attenuated" that the activity is not protected under the Act. *Eastex, Inc.,* 437 U.S. 556, 567–568 (1978). In *Kysor/Cadillac,* 309 NLRB 237, 237 fn. 3 (1992), the Board explained that the extent of protection afforded to an employee's activity depends on its "nexus to legitimate employee concerns about employment-related matters."

In the instant case, Oakes testified before the Lorain Board regarding the Respondent's failure to comply with a municipal bonding ordinance. The ordinance was wholly unrelated to employees' terms and conditions of employment. The bond had no connection to any labor dispute involving the Respondent. The purpose of the bond was to finance the city's building department, not to regulate any employee's wages, benefits, hours, or any other terms or conditions of employment. Thus, there was no relationship between the city bonding ordinance and employees' terms and conditions of employment.

Nor did Oakes' presentation to the Lorain council show such a relationship. At no point during Oakes' 20-minute presentation did he refer to any term or condition of employment of any present or future union member or Tradesmen employee. Nor did he make any attempt to explain how his argument could affect the Section 7 (or other) rights of any such persons. He made no reference to any organizing or other assertedly protected activity. Indeed, at the unfair labor practice hearing, Oakes acknowledged that he purposely omitted those subjects because "that wasn't the purpose for the [Council] hearing."

My colleagues seek to analogize Oakes' activity to area standards picketing. The analogy does not fit. The goal of a union's area standards picketing is to increase the labor costs of the picketed employer. Thus, the picketed employer will no longer be able to underbid "union scale" employers, and those employers and their employees will reap the benefit. By contrast, in the instant situation, as discussed above, the effort was not directed toward increasing the wages and benefits of nonunion employees so as to protect the wages and benefits of unionized employees. Oakes' activity was not aimed at raising or protecting the standards of any employees. Rather, Oakes' activity was aimed at punishing Respondent because its employees had not chosen to become unionized. Indeed, Oakes' activities would have been detrimental to the Respondent's employees. If Oakes had been successful, the Respondent would have lost the job, absent a bond.

In sum, Oakes' efforts were not related to terms and conditions of employment. Rather, they were simply an effort by Oakes to cause economic harm to an employer because its employees had not chosen to unionize. In these circumstances, the activities were unprotected. See *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953).[1]

Finally, the Union argues that it wanted to "level the playing field" as between unionized and nonunion contractors. However, this is not a case where an employer reaps an advantage by being nonunion. The ordinance applies to all contractors, union and nonunion. The Respondent was not covered because it was not a contractor within the meaning of the ordinance. Based on the foregoing, I find Oakes' activity was not protected, and the Respondent's failure to employ him for that activity was not unlawful.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

[1] My colleagues rely on *Eastex* for the proposition that employees are protected "when they engage in otherwise proper concerted activities in support of employees of employers other than their own." As shown, the activity was not for the benefit of *any* employees.

WE WILL NOT fail and refuse to hire Matthew Oakes because he engaged formed, joined, or assisted the Union and its constituent members or engaged in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Matthew Oakes immediate employment in the same position he would have had but for our unlawful discrimination against him or, if the job no longer exists, to a substantially equivalent position.

WE WILL make Matthew Oakes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to our unlawful failure and refusal to hire Matthew Oakes, and within 3 days thereafter, notify Matthew Oakes that this has been done.

TRADESMEN INTERNATIONAL, INC.

Steven Wilson, Esq., for the General Counsel.
Vincent T. Norwillo, Esq., Solon, Ohio, for the Respondent.
Richard P. James, Esq.[1] *(Allotta & Farley Co., L.P.A.),* of Toledo, Ohio, for the Union.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge**.** In a May 28, 1998 complaint, the General Counsel alleges that the Respondent, Tradesmen International, Inc. (Tradesmen), refused to hire Matthew Oakes, an organizer for the Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL–CIO (the Union). Specifically, it is alleged that Oakes was not hired because he tried to lobby the city of Lorain, Ohio to require the Respondent to pay a surety bond for work performed in the city, thus increasing this nonunion Respondent's cost of doing business therein.

This case was tried in Cleveland, Ohio on October 20, 1998, during which the General Counsel called Oakes as a witness, and the Respondent called Christopher Haders, a job recruiter in its Cleveland office. The General Counsel and the Union then filed briefs on November 23, followed by the Respondent on November 27, 1998.

II. FINDINGS OF FACT

Tradesmen supplies its workers primarily to nonunion construction companies in the eastern United States. It is headquartered in suburban Cleveland (Solon, Ohio) and has 23 offices in 12 states. Representatives from these offices solicit business from various construction companies, whereupon Tradesmen provides workers in over a dozen trades (Tr. 152–56, 160). Tradesmen's annual revenues from its non-Ohio clients exceeds $50,000 (G.C. Ex. 1(e)). While Tradesmen pays its employees, who in turn perform these various jobs for various contractors, the contractors actually supervise the day-to-day activities of the Tradesmen employees on the worksites (Tr. 173; Joint Ex. 2, p.3).

One such Tradesmen client was Bay Mechanical and Electrical Inc. (Bay) of Lorain, Ohio, which signed a contract with Tradesmen on January 15, 1997 (R. Ex. 4). Bay was a contractor on the Community Health Partners project in Lorain (Tr. 175–76). Tradesmen supplied 19 employees in five different trades to Bay (Tr. 178). The city of Lorain passed the following ordinance in July 1996:

> (a) Registration and Bond Required**.**
> Any person, firm or corporation engaged in contracting, construction, alteration, repair, removal or demolition of buildings or structures, as a business for profit in the City of Lorain, shall, before entering into such a business or doing any part of the work, register with the City and furnish a surety bond to carry on such business or work within the City. The bond shall be subject to approval of the Chief Building Inspector and shall ensure that the applicant shall comply with all provisions of City Building Codes, Ohio Revised Code, City Ordinances and all lawful rules and orders issued pursuant thereto, and in an amount as follows:
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> | | |
> |---|---|
> | General Contractor | $5,000.00 |
> | Sub-Contractor | $5,000.00 |
>
> (b) Definitions. As used in this section, certain terms are defined as follows:
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> 1. General Contractor means any person who enters into a contract with a building owner or his agent for the performance of work involving more than one trade or craft. The General Contractor shall be permitted to acquire permits for all trades with the exception of Sprinkler or Fire AlarmSystems, provided he lists all licensed subcontractors at the time he acquires the permits.
>
> 2. Sub-Contractor means any person who performs a special skill, trade, craft or profession as a business for profitin the City, and as part of a construction contract, whether on behalf of the general contractor, building owner, or the agent of an owner.

The purpose of the bond was to provide the city's building department "with sufficient resources" to meet its "funding requirements." (Joint Ex. 1). Jack Murphy is the city's chief building inspector (Tr. 65).

Matthew Oakes is an organizer for the Union. Oakes first talked with Murphy in late 1996, whereupon Oakes learned that Tradesmen was supplying Bay with employees for the Community Health Partners project in Lorain (Tr. 111). Thereafter, Oakes posed as a potential Tradesmen customer and met with a Tradesmen representative to learn about the nature of Tradesmen's business (Tr. 129–30). In early 1997 Oakes tried to organize Tradesmen employees by getting them to sign union

[1] Mr. James did not appear at the trial. Afterwards, however, he requested permission to file a brief. That request was granted by an Order issued on November 6, 1998.

authorization cards (Tr. 32). Then, on March 24, 1997, Oakes called Tradesmen's Cleveland (Valley View, Ohio) field office to ask about employment in the heating, ventilating and air conditioning (HVAC) field. He obtained a job interview with that office's recruiter, Christopher Haders, on March 28 (Tr. 32–34, 151). Oakes filled out a job application in which he disclosed his current $21 an hour job as fulltime organizer of nonunion companies (R. Ex. 1). Haders asked Oakes about his HVAC experience, whereupon Haders pronounced him qualified. But Haders asked Oakes if he would continue to work as an organizer, whereupon Oakes replied that any organizing would be done on his own time. Finally, Haders said that Tradesmen could not pay Oakes his organizer's salary of $21 per hour to which Oakes replied that he would accept a lesser amount (Tr. 37–39). According to Oakes, Haders said "welcome aboard" at the end of the one-hour interview. But Oakes failed to state this in his pretrial affidavit (Tr. 88–89, 91–92). And Haders considered a person hired only upon beginning work (Tr. 152).

Although most of Trademen's clients are nonunion construction companies, some of Tradesmen's employees are union members. For example, Haders hired Henry Adams in early April 1997 (R. Ex. 6; Tr. 180–81). As for Oakes, he called Haders on April 4, 1997, to inquire when he would start work. But Haders told him that there was no HVAC work available yet. Oakes called again on April 15, and Haders again said there was no available work, but added that Oakes could attend an orientation class the next day. Oakes did so, receiving a "medical emergency procedures" card (G.C. Ex. 3; Tr. 41–42). Oakes called Haders again on April 22, was again told there was no work, but was told to call in once a week. Haders also asked if Oakes had attended a Tradesmen safety class yet. Oakes tried to attend the class on April 24 but it was cancelled. Oakes called in again on April 29, May 15, and May 23 and was told all three times that there was no work (Tr. 46–49).

Oakes was concerned that Tradesmen did not register and pay a bond under the Lorain, Ohio ordinance in connection with the Community Health Partners project. Thus, Tradesmen's cost for working on the Lorain project was less than that of a union contractor or subcontractor which had to register and pay a bond (Tr. 68–70). To this end, Oakes talked with building inspector Murphy, and gave Murphy a list of subcontractors he considered as falling under the registration/bonding ordinance. Tradesmen was one of three businesses on that list (G.C. Ex. 6; Tr. 72–73). Oakes realized that his actions could result in the removal of Tradesmen employees from the Lorain jobsite (Tr. 115, 121–22). Thereafter, Murphy decided to order all Tradesmen employees off the Lorain jobsite. But his decision was stayed, pending a ruling from the Lorain Board of Building Standards and Appeals. On May 28, 1997, Oakes attended the Board meeting, identifying himself as a Local 33 member and Tradesmen employee. Oakes opined that Tradesmen should be considered a subcontractor under the ordinance. A lawyer for Tradesmen then opined that Tradesmen merely leased employees to contractors and thus was not covered by the ordinance (Joint Ex. 2).

On May 30, 1997, Oakes again called Haders about HVAC work. Oakes was only able to talk to someone else, who said that there was no work available (Tr. 50–52). Then, Tradesmen Vice President Keith Allen called Oakes. Oakes tape recorded the call (G.C. Ex.4; Tr. 52-53, 176-77). Allen told Oakes:

> You intentionally tried to hurt our company. So we don't want you working for us. We're not gonna to put you to work. We put you on a list. If we have jobs. You're actually not on the payroll or hired until you actually go to work.

(G.C. Ex. 5).

According to Haders, if there was a HVAC position for Oakes before May 30 he would have considered Oakes (Tr. 215), and/or called Oakes for work (Tr. 179). But there were no such jobs before May 30, and, indeed, no other new HVAC employees were hired by Tradesmen from late March to late May 1997 (Tr. 168). But after May 30, 1997, Tradesmen did fill HVAC jobs with new employees from its Cleveland office (Tr. 216). And in early June 1997, the city of Lorain's Board of Building Standards and Appeals determined that Tradesmen was not a subcontractor under the registration/bonding ordinance (Jt. Exh. 3).

III. ANALYSIS

This is not the typical "salting"[2] case, where a union organizer attempts to obtain a job with a nonunion company. Indeed, the General Counsel does not allege that Tradesmen failed to consider for hire, and/or hire, Union Organizer Oakes from the time he applied for a job in late March 1997 through late May 1997.[3] In any event, the evidence shows, and the Presiding Judge concludes, that Tradesman had no openings in Oakes' HVAC job field during this period of time, and that there is no evidence of union animus by Tradesmen.

Instead, this case turns on Oakes' extracurricular activities with the city of Lorain. Specifically, Oakes sought to "assist" unnamed union contractors doing business in Lorain by requiring Tradesmen likewise to register and pay a $5,000 bond for doing business there, notwithstanding the fact that Tradesmen merely leased employees to contractors. But when Tradesmen management learned of Oakes' efforts, they informed him on May 30, 1997 that he would no longer be considered for a job with the Company. Thus, it is alleged that Tradesmen violated the Act by retaliating against Oakes solely because of this activity.

Initially, it is concluded that Oakes' solo effort to increase Tradesmen's cost of doing business in Lorain was not "concerted activity" as defined by Section 7 of the Act. In *Meyers Industries,* 268 NLRB 493, 497 (1984), the Board adopted the following test:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with oron the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the

[2] The term "salting" means a union's overt, or covert, entry into a nonunion company. The term is analogous to "salting a mine" or "salting the books." See *Tualatin Electric,* 312 NLRB 129 (1993).

[3] See Tr. 184–85.

> concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

And in *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 831 (1984), the Supreme Court held that an individual employee may be engaged in concerted activity when: (1) the lone employee intends to induce group activity; or (2) the lone employee acts as a representative of at least one other employee. But neither of these situations exist in the instant case. Indeed, there is not one whit of evidence that anyone else from Local 33 knew of or authorized Oakes' multifaceted efforts to organize Tradesmen, obtain employment with Tradesmen, and lobby the city of Lorain against Tradesmen. Nor does Oakes' mere label as an "organizer," and his disclosure thereof to Haders, automatically cloak all his activities with "concerted" status. Thus, the Respondent is correct that the preponderance of the evidence establishes Oakes' lobbying efforts with the city of Lorain as a "personal lark."

Even if Oakes' activities are deemed "concerted," it is also concluded that these activities were not protected under Section 7. In *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978), the Supreme Court held that employees may "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," such as administrative and judicial forums. But the Court also recognized that

> some concerted activity bears a less immediate relationship to employees' interests as employees than other suchactivity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause. . . . That task is for the Board to perform. . . .

437 U.S. at 567–68.

In the Presiding Judge's view, this is such a case. First and most importantly, Oakes' lobbying efforts with the Lorain building inspector and Board of Building Standards and Appeals had absolutely nothing to do with the specific terms and conditions of employment of the Tradesmen employees. But in order to be protected by Section 7, an employee's activity "must in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute.'" *Vemco, Inc. v. NLRB*, 79 F.3d 526, 530 (6th Cir. 1996), quoting *NLRB v. Leslie Metal Arts Co.,* 509 F.2d 811, 813 (6th Cir. 1975). Nor was Oakes' activity even related to the "employees' interests generally," which the Board has also deemed insufficient to confer protected status. *Harrah's Lake Tahoe Report,* 307 NLRB 182 (1992). Moreover, the purpose of Lorain's registration and bonding ordinance was to provide the city with sufficient funds for its own building department, as opposed to having anything to do with the employees of various contractors or subcontractors working in the city.

Second, Oakes' lobbying campaign was also unprotected because it was designed to injure Tradesmen's business. *NLRB v. Electrical Workers Local 1229,* 346 U.S. 464 (1953). While not all "disloyal" employee conduct loses protection under the Act, Oakes' efforts were hardly defensive. Compare *Technicolor Services,* 276 NLRB 383 (1985) (distinguishing activity "aggressive, disruptive and damaging to the company's business" with "purely defensive" activity). Instead, Oakes actively waged his lobbying campaign with various Lorain officials to classify Tradesmen as subcontractor under the city ordinance. In this regard, the Presiding Judge rejects the contentions of the General Counsel and the Union that building inspector Murphy approached Oakes for help in policing the ordinance. Murphy did not testify in this case, however, and the evidence shows that the registration/bonding effort was all Oakes' idea. Further, as demonstrated by Murphy's initial ruling ordering Tradesmen employees off the jobsite, Oakes efforts posed a threat of immediate harm to Tradesmen's business operation in Lorain. See *Technicolor Services,* supra at 389 (actual or reasonable threat of economic harm is illegal). Finally, if his efforts to make Tradesmen less competitive in Lorain had been successful, the Tradesmen employees would also have been harmed. Indeed, building inspection Murphy tried to order all Trademen employees off the jobsite before the May 30 Board meeting. Thus, the Presiding Judge rejects the General Counsel's disingenuous argument that Oakes was actually trying to help Tradesmen employees by avoiding their intermittent or long-term removal from jobs in the city.

In summary, Senator Wagner would never have recognized the bizarre interpretation of Section 7 which would extend protected status to activity wholly unrelated to an employer's labor practices, and which also results in harm to that employer and its employees. That is exactly the type of activity which Matthew Oakes engaged in, and was permissibly sanctioned for by Tradesmen. *NLRB v. Local Union No. 1229, IBEW*, supra. Thus, Tradesmen's failure to consider Oakes for employment after May 30, 1997 did not violate the Act.

IV. CONCLUSIONS OF LAW

1. The Respondent, Tradesmen International, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) and (3) of the Act in refusing to consider Matthew Oakes for employment after May 30, 1997.

[Recommended Order omitted from publication.]